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No. 82-418

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,
*Petitioner,*

—v.—

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

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### REPLY WITH RESPECT TO THE FIRST ISSUE PRESENTED

The National Labor Relations Board (NLRB) seeks to avoid a determination of the first of the two issues presented in this case by asserting that the issue is not properly before the Supreme Court because it was never raised before the NLRB. This argument is now presented for the first time. The opinion of the Court of Appeals in this case (App. A to petition) shows that it was not raised there. The NLRB itself understood that the issue was before it, and ruled on the very proposition which the government now asserts was not raised. The NLRB held

that "the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike." (App. B to petition, p. 27a footnote 14 omitted; see also App. B, p. 29a, paragraph numbered 3; and App. B, p. 30a, paragraph numbered 1(a)) Indeed the first issue raised in the petition, a questioning of the determination that strikers are unprotected when they engage in a partial strike under circumstances where they would have been protected had they engaged in a full strike, is the cornerstone of the NLRB's decision, its conclusion of law, and its order.

Moreover, the transcript of the record before the NLRB includes an opening statement by counsel for GAIU Local 13-B, Graphic Arts International Union (Union) which, although not a model of clarity, directly presents the first issue made to this Court on this petition, namely: that partial strikers should be given the same protection that full strikers would be given in the same circumstances. Thus, the opening statement reads:

> "MR. DUBIN: Yes. We intend to show, simply because there was only a partial strike, let us call it that, makes no difference. The activity, if it were concerted protected activity, there'd be no unfair labor practice charge against this union. If this employer committed an unfair labor practice or several, and the union went out on an unfair labor practice strike, there would be no charge against the union. But, because the union shows [chose] as its self-help remedy not to engage in a complete strike, but only to engage in something less than that, it's facing these charges.
>
> "Our intent will be to show that this distinction really doesn't make much sense in this proceeding. If the union really has no other choice, sure it can file a charge and it did file a charge, and the resolution of that charge is months off, as this case shows, what does the union do the first month when it's faced with unfair labor prac-

tices? What does it do the second month it's faced with unfair labor practices? It has to do something.

"It shows [chose] a lesser measure than a complete strike and is facing charges as a result of it, and we don't see the distinction. That's our case."

Therefore, on the record before the NLRB and on the basis of the decision of the NLRB, it is shown that this belated assertion, which was never raised before the Court of Appeals, is incorrect. The issue was before the NLRB and is properly before this Court.

Except for this incorrect assertion, the NLRB offers no reason why this Court should not finally rule on this issue. It is time for the matter to be decided, for both labor and management should have the definitive statement of the law which only this Court can provide.

## REPLY WITH RESPECT TO THE SECOND ISSUE PRESENTED

Likewise with respect to the second issue raised: the state of the law is unsettled and guidance from this Court is necessary for passage through what are now conflicting guideposts. Some evidence of the unsettled state of the law is found from the fact that the Union and the NLRB are both citing the same decisions of this Court to support their respective positions. The Union relies on the results reached and the language as applied and as limited by the Court itself in its decisions. The NLRB relies on a broad interpretation of the language of the majority while repeating the arguments made in the dissents.

In cases where this Court did *not* find any union violation, the Court wrote: "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967); quoted in *Scofield v.*

*NLRB,* 394 U.S. 423, 428, (1969) But this language, so far as our research shows, has never been applied by this Court to hold that a union has violated the law by enforcing an internal rule because that rule affected an employee's employment status. The NLRB has not cited such a case. A careful reading of the language in *Allis-Chalmers,* especially as elaborated on in *Scofield* at 394 U.S. at 428, reveals that this Court, in writing of "barring *enforcement* of a union's internal regulations to affect a member's employment status" (emphasis added) had in mind the distinction between "internal from external *enforcement*", (emphasis added) and not the substance of the rule itself.

Thus, the case cited by the NLRB in its brief in opposition to the petition in this case, *Printz Leather Co.*, 92 NLRB 1312 (1951), is cited by this Court in *Scofield,* 394 U.S. at 429 ftnt. 5, not for the proposition that the union rule itself constituted a violation of the law; but for the proposition that the union's enforcement of the rule by compelling an employee's discharge from his employment constituted the violation. See *NLRB v. International Longshoremen's and Warehousemen's Union, Local 13,* 581 F. 2d 1321 (9th Cir. 1981).

In this case, the Union's sole efforts to enforce its rule were precisely those employed in *Allis-Chalmers,* a fine and an attempt to effect collection of the fine by bringing legal proceedings in a court of law. Thus, the NLRB and the court below in this case miscited *Allis-Chalmers* and *Scofield* and strayed from this Court's specific approval, in *Scofield* at 394 U.S. at 428 ftnt. 4, of the position "that § 8(b)(1)(A)'s legislative history requires a narrow construction. . .". There is, therefore, a clear distinction between the *Printz Leather Co.* case and the one now before this Court.

In *American Newspaper Publishers Assoc. v. NLRB,* 344 U.S. 812 (1952) granting certiorari as to one issue only, this Court declined to review that part of the decision at 193 F. 2d 782 (7th Cir. 1951) which held that it was not a violation of Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) for a union to

enact and enforce a rule affecting an employee's employment status. The rule in that case prohibited a member from accepting employment with an employer who employs non-union employees.

See *American Federation of Musicians of the United States and Canada v. Carroll,* 391 U.S. 99 (1968) where, on review of *Carroll v. American Federation of Musicians of the United States and Canada,* 372 F. 2d 155 (2d Cir. 1967), this Court affirmed, in an entirely different context, the decision in *Carroll v. American Federation of Musicians of the United States and Canada,* 241 F. Supp. 865 (U.S.D.C., S.D.N.Y., 1965) and the numerous internal union rules in that case which directly affected the employment status of employees. (See findings of fact 92, 93, 105, 106, 107, 114 and 127 at 241 F. Supp. at 879, 880 and 881 respectively.)

In view of the foregoing, and of other decisions such as *Glasser v. NLRB,* 395 F. 2d 401 (2nd Cir. 1968) which approve internal union rules directly affecting an employee's employment status, we ask this Court to resolve the apparent inconsistency between the circuits and within the Second Circuit and to settle the law.

The NLRB in its brief in opposition also relies on the dictum in *Scofield v. NLRB,* 394 U.S. at 429 which states that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced. . ." In so doing, the NLRB rests not on the holding but rather echoes the dissenting argument in *Allis-Chalmers,* 388 U.S. at 203 which was adopted by reference as the dissent in *Scofield,* 394 U.S. at 436.

The dissent by Mr. Justice Black in *Allis-Chalmers* presents precisely the position taken by the NLRB in this case, a position which can be argued in every union rule case, and therefore a position which, if accepted, will entirely vitiate the meaning as determined by this Court of the proviso to Section 8(b)(1)(A). The dissent in *Allis-Chalmers* reads in part: "Contrary to the Court, I am not at all certain that a union's right under the proviso to prescribe rules for the retention of

membership includes the right to restrain a member from working by trying him. . .and fining him for exercising his § 7 right of refusing to participate in a strike,. . .". 388 U.S. at 203.

This argument, that the union rule violates the policy of the law by frustrating an employee's Section 7 rights, is a refrain found in dissenting opinions, *IAM, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB 365, 369 (1970); *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67, 73 (1964); *Local 283, UAW (Wisconsin Motor Corp.)*, 145 NLRB 1097, 1107 (1964). As the NLRB has repeatedly recognized that: "In a sense, virtually all union rules affect a member's employment relationship." *Local 283, UAW (Wisconsin Motor Corp.)*, 145 NLRB at 1104; *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 NLRB at 70; *IAM, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB at 368 (1970), it can also be said that: "In a sense, virtually all union rules impinge on a member's statutory rights."

This Court has rejected the position of the dissenters and it appears to have construed the proviso to Section 8(b)(1)(A) differently from the NLRB and the court below in this case. This Court has found that an internal union rule, internally enforced, which deprives a union member of the opportunity to refrain from the concerted activity of a strike, so long as he remains a member, does not frustrate or invade an overriding policy of the labor law.

In this connection, we note that the brief in opposition to the petition wholly ignores a central point in this case, namely: that the decision of the court below appears to run directly counter to three fundamental policies set forth in the Federal laws as written by Congress and as expounded by decisions of this Court.

## CONCLUSION

This case provides a vehicle to help define the law, resolve open questions, set to rest apparent decisional inconsistencies, and harmonize policies established by the Congress in the various Federal labor acts, basic policies which appear to be undermined by the decision below.

Respectfully submitted,

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